SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 57.

JOVITE CAU, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

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(18,544)

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STATEMENT.

This is a suit for fifty-seven hundred and fifty-four and $\frac{93}{100}$ ($5,754.93) dollars, the value of one hundred and ten (110) bales of cotton delivered to the Texas and Pacific Railway Company by Jovite Cau at Texarkana, Texas, for carriage from that place to the city of New Orleans, Louisiana.

The suit was first instituted in the civil district court for the parish of Orleans, State of Louisiana, but subsequently removed to the circuit court of the United States for the eastern district of Louisiana, fifth circuit, on the application of the defendant in error, on the ground that it was a corporation created by and organized under certain acts of Congress (R., p. 5).

In the circuit court the defendant in error first pleaded the general issue, and afterwards, under the reserve of this plea, set up that the cotton was received by it to be transported under bills of lading, evidencing the written contracts between plaintiff and defendant; that these bills of lading were in the possession of the plaintiff, and defendant asked that they be made part of its answer as if fully set out at length; that the cotton was destroyed at Texarkana, Texas, as alleged in the petition; that said bills of lading contained the express stipulation, among others, that the defendant should not be liable for the loss of or damage to the said cotton by fire, and defendant expressly claimed and pleaded the benefit of this exemption. The answer further set out that plaintiff had no real or substantial interest in the subject-matter of the suit, as prior to the institution thereof he had parted with all right, title, and interest in and to any claim he might have against defendant, growing out of the loss or damage to the said cotton, to certain insurance company or companies, the names of which were unknown to defendant, but which would be proven on the trial of the case; that if plaintiff had any right or cause of action it no longer belonged to or vested in him at the institution of the suit (R., pp. 9 and 10).

Subsequently, on the trial of the case, there was a verdict and judgment in favor of the defendant (R., pp. 11, 14).

During the trial of the case bills of exception were taken to the rulings and instructions of the circuit judge, all of which are set out in the numbers 1, 2, 3, 4, and 5 (R., pp. 14, 49, 51, 52, and 53).

The first bill of exception was to the action of the circuit court in instructing or directing the jury, upon the whole of

the testimony and evidence heard upon the trial of the case, to find a verdict for the defendant (R., pp. 14–16).

The whole of the evidence offered by both plaintiff and defendant was annexed to and made part of bill of exception No. 1. This evidence included the bills of lading for the cotton in question, issued by defendant to plaintiff at Texarkana, Texas. the third paragraph of which (R., pp. 19, 25, 26, 27) contained the following stipulation, to wit:

"That neither the Texas and Pacific Railway Company, nor any connecting carrier handling said cotton, shall be liable for damage to, or destruction of said cotton by fire * * *" (R., p. 19).

The defendant had insured itself against any loss of or damage to the cotton by fire while it was in its possession as a carrier; and it appears from the evidence that the 110 bales of cotton in question here were destroyed by fire while it was in the hands of the Union Compress Company at Texarkana, Texas, for account of the Texas and Pacific Railway Company. This is shown by the testimony of G. W. West, taken under commission and made part of bill of exception No. 1 (R., p. 29).

The witness says that he was the superintendent of the Union Compress Company at Texarkana; that he knew of the 110 bales of cotton, the subject of this suit; that he was manager of the compress at the time and had received and receipted for the same; that this cotton was totally destroyed by fire at a time when same was covered by insurance obtained by the compress company to protect the transportation companies against loss by fire on all cotton for which they had signed bills of lading and until the cotton was

loaded back into the cars. This would include the 110 bales of cotton for the value of which defendant is here sued. The witness says further that the railroad companies were notified each day of the number of bales of cotton in the possession of the compress for the railroad company's account; the compress company at the time had receipts from the railroad company covering the above cotton; the policies were delivered to the agent of the Texas and Pacific Railway Company, and that this procedure was strictly followed in the instant case (R., pp. 29, 30).

On cross-examination the witness repeats that he knew the cotton was in the care of the compress company at the time of destruction by fire, and that it was insured in favor of the defendant. These policies were turned over to the agent of the railroad company.

F. W. Offenhauser, whose testimony was taken under commission and was attached as part thereof to bill of exception No. 1, says that the fire occurred September 19, 1900, and that the cotton burned was all covered by insurance; that the course of dealing with the Union Compress Co., as to insurance against loss of or damage to cotton by fire while in the possession or custody, after bills of lading for same had been issued, was to effect insurance for the benefit and in the name of each particular railroad company for which it was compressing cotton; that this rule applied to all cotton coming into the possession of the compress company for account of the railroad companies; that while he knows nothing as to the particular 110 bales of cotton in question, he does say that about 1,500 bales of cotton belonging to various parties were destroyed by the fire of September 19, 1900, and that it was all covered by insurance, and that it was the

custom of the compress company to protect railroad companies as above stated. The policies in all cases of the Texas and Pacific Railway Company were delivered to the agent of the company at Texarkana.

On cross-examination he says that, as the agent of the insurance company, he caused the policies to be issued and delivered to the Texas and Pacific Railway Company at Texarkana (R., p. 31).

And he adds that the policies for the insurance mentioned by him were delivered to the agent of the Texas and Pacific Railway Company at Texarkana (R., p. 32).

An extract from the policy shows that the insurance was—

"on cotton in bales, for which bills of lading had been issued and for which they shall be legally liable for loss or damage, by fire, while contained on compress platform and in cars on switches adjacent thereto situate" (R., p. 32).

An examination of the bills of lading themselves would show that the first was issued September 15, 1900 (R., p. 21); the second, September 17, 1900 (R., p. 26), and the third, September 17, 1900 (R., p. 28), all two days previous to the fire, which was on September 19, 1900.

The testimony of V. W. Pons, which was annexed to bill of exception No. 1 as part thereof, shows that neither Mr. Cau, who was not present in Texarkana at the time the transaction spoken of occurred, nor the witness himself, who was there and acted as Mr. Cau's agent, ever obtained any policies of insurance on the cotton, nor had the plaintiff made any claim against any insurance company on account of this loss (R., pp. 34, 35).

On the merits Mr. Pons testified that he was Mr. Cad's cotton buyer at Texarkana in September, 1900; that he personally bought the one hundred and ten bales in question here for the purpose of shipping it first to New Orleans and then to Europe; that he delivered it to the defendant as a common carrier for the purpose of having it brought from Texarkana to New Orleans (R., p. 35); that when he obtained the bills of lading for the cotton he was not given any option as to the rate of freight he should pay for bringing the cotton from Texarkana to New Orleans; that when he went to the agent of the Texas and Pacific Railway Company he was told that he could get but one rate—sixty cents per hundred—and that was the rate of the other roads; that he sought the defendant simply to get the rate and gave them the cotton at the rate which was named to him. He repeats that the agent of the defendant at Texarkana, to whom he applied for information, told him that there was but one rate which he could get; that he knew that the tariff of all roads was the same, and this was the result of his application to each one of them for information (R., pp. 36, 37).

That the tariff which was offered in evidence (and found on page 17 of the record) was obtained by the witness from the Kansas City and Southern Railroad Company, which was the only carrier which so furnished him with one; that he applied to all the roads to get the rates to New Orleans and he could get no cheaper rate.

The printed circular or tariff so offered in evidence by the defendant purports to have been issued by the Texas and Pacific Railway Company, with other companies, and is styled "Joint freight tariff applying on cotton and cotton

linters, in bales any quantity, from Texarkana, Texas, to points named below; issued September 4th, 1900; effective September 17th, 1900," and one of the points named below is "New Orleans (depot delivery), La., sixty cents;" "New Orleans (shipside delivery), La., sixty-three cents." By a note at the bottom of this circular it is declared "No contract will be made, or bill of lading issued for 'New Orleans shipside delivery'" (R., p. 17).

One or more of the bills of lading in question here, containing the exemption clause, was made out in advance by the plaintiff, and the other or others by the defendant (R., pp. 39, 42). It seems, however, that the bills of lading, from which plaintiff's clerk made out one or more, had already been received from the defendant, at Texarkana, Texas, and this in response to plaintiff's request to be furnished with bills of lading for cotton to be shipped to New Orleans; it seems when the plaintiff received these it was in response to a request for bills of lading to New Orleans; defendant's agent informed plaintiff's clerk at the same time that he had but one form of bill of lading, and that is what he furnished the plaintiff; that Pons, plaintiff's agent, asked the company's agent for a form of bill of lading to New Orleans, and he got those in question, among others, the one or more which he, Pons, had already filled up, except the signature, for one or more of the shipments in question here; he afterwards applied to the company for other bills of lading, and the agent answered him as before, when asked, and the agent at the time declared that the bills of lading furnished were of the same form as those already furnished (R., pp. 42, 43, and 44).

Plaintiff's agent states specially that he asked what was the rate to carry cotton to New Orleans, whether there was but one rate, and that the agent of defendant replied that he could not give him any other rate; the plaintiff made no special application for a rate based upon a bill of lading not containing the "fire clause" in question (R., p. 40).

The witness is positive in his declaration that he asked defendant's agent what was the rate to New Orleans, and the answer was that he had but one rate, and he could not give him any cheaper or dearer rate (R., p. 41); nothing was said by the agent as to a different kind of contract that could be given to the plaintiff; plaintiff's agent was not told that he could obtain from the company a contract of carriage under which it would be liable, practically, as an insurer, or, if he chose, a contract under which it would not be liable in case of fire; that no information was given by the agent of defendant upon which plaintiff's representative could have made a choice between these two kinds of contract; plaintiff was offered no option, nor any choice of selection as to the kind of contract under which the company would ship his cotton (R., p. 42).

ASSIGNMENTS OF ERROR.

The following are the assignments of error:

First. That the court erred in finding that there was no error in the refusal of the circuit court of the request of plaintiff for a direction or instruction to the jury to find, upon the whole of the evidence offered by both plaintiff and defendant and submitted to the jury, a verdict for

plaintiff; that the circuit court of appeals should have held that there was error in the said refusal of the circuit court.

Second. That the court erred in finding that there was no error in the circuit court in its direction or instruction to the jury to find a verdict for the defendant; that upon the whole of the evidence offered and submitted to the jury by both plaintiff and defendant the said direction or instruction of the circuit court to the jury was error; and the circuit court of appeals committed error in not finding that there was error in the direction or instruction of the circuit court to the jury to find a verdict for the defendant.

Third. That the circuit court of appeals erred in finding that there was no error in the refusal of the circuit court to allow the submission to the jury of the question whether or not, upon the whole of the evidence offered and submitted to the jury by both plaintiff and defendant, the destruction of plaintiff's cotton, as stated in his petition, was not due to or caused by the negligence of the defendant; that the circuit court of appeals should have reversed the judgment of the circuit court upon the ground that the question whether or not the destruction of plaintiff's said cotton by fire was due to or caused by defendant's negligence should have been submitted to the jury in the circuit court.

Fourth. That upon the whole of the evidence offered by both plaintiff and defendant, and submitted to the jury, it was clearly shown that the destruction of the cotton of the plaintiff described in the petition was due to and caused by the negligence of the defendant from which neither the law

or public policy permits or will permit the defendant to stipulate for its non-liabilities; that from the whole evidence, offered by both plaintiff and defendant, and submitted to the jury herein upon the trial of said cause, and upon which their verdict is to be found, it clearly appeared that the loss and destruction by fire of plaintiff's cotton described in the petition was due and caused solely by the negligence of the defendant; and that it was liable for the loss and destruction of plaintiff's cotton, the stipulation in the bill of lading herein exempting the defendant from any liability for loss or damage to said cotton by fire, to the contrary notwithstanding; and the circuit court, in not so holding, and so directing and instructing the jury, committed manifest and grievous error to the prejudice of plaintiff.

And the said court committed grievous and manifest error in directing and instructing the jury as aforesaid, upon the whole of the evidence offered by both plaintiff and defendant, this constituting all the evidence before the jury, to find a verdict for the defendant.

That the circuit court of appeals committed error to the prejudice of plaintiff in not finding, upon the grounds hereinbefore set out in the four assignments of error, that the circuit court committed error to the grievous injury of plaintiff, and upon the grounds and reasons set out in these four assignments of error should have reversed the judgment of the circuit court.

SYLLABUS.

In order to be binding upon the shipper, a contract limiting the common-law liability of a carrier must be upheld by a valid consideration.

Hutchinson on Carriers, sec. 278.

Wehman *vs.* Minneapolis, etc., Co., 61 Am. & Eng. R. Cases, 273.

Contracts limiting the common-law liability of carriers are not favored by the law, and they are not binding on the shipper unless fairly made and freely entered into by him.

Adams Express Co. *vs.* Nock, 2 Duval (Ky.), 562–565.

Hance *vs.* Wabash, etc., R. Co., 56 Mo. App., 476–482

In order to be valid, such contract must be the choice of the shipper and not of the carrier. The shipper must be allowed an option or opportunity to select under which, the common-law or limited liability, he will ship his goods. If such free choice or option is not allowed him, the contract is not reasonable and therefore is void. Both rates, that for transportation under the common-law liability and that under the limited liability, must be free to the shipper, in order that he may have real liberty of choice in making the selection between the two; otherwise the contract limiting the liability is not fair or reasonable, and therefore is void.

Atchison, etc., Co. *vs.* Dill, 56 Am. & Eng. R. Cases, 376.

Dovignac *vs.* Mo. Pac. R. Co., 57 Mo. App., 550.

Lewis *vs.* Great Western R. Co., 3 Q. B. Div., 195: 47 L. J., Q. B. Div., 131.

Car *vs.* Lancashire, etc., Co., 21 L. J., Exch., 261; 7 Exch., 707.

L. & N. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. Cases, 372–375.

A carrier is not permitted to so limit its liability as to exempt it from the consequences of its own negligence.

N. Y. Central R. Co. *vs.* Lockwood, 17 Wall., 357–384.

Where there is a clause limiting the liability of a carrier, it bears the burden of proof to show not only that the cause of the loss was within the exemption, but also that it was not due to its negligence or that of its servants.

South, etc., Co. *vs.* Henlin, 56 Ala., 606 (23 Am. Dec., 598).

Inman *vs.* South Carolina R. Co., 129 U. S., 128–139.

Duvenick *vs.* Mo. Pac. R. Co., 57 Mo. App., 550–555.

Dillard *vs.* L. & N. R. Co., 2 Lea (Tenn.), 288.

Steele *vs.* Townsend, 37 Ala., 247.

Adams Exp. Co. *vs.* Stetaners, 68 Ill., 184 (14 Am. Dec., 457).

Texas, etc., Co. *vs.* Richmond, 94 Tex., 571 (63 S. W., 619).

T. & P. R'y Co. *vs.* Clayton, 173 U. S., 348.

In Louisiana, where the contract exempts the carrier from any loss by fire, he carries the burden of proving not only the exemption, but also that the loss was not due to the carrier's negligence or omission of duty in any manner causing or contributing thereto.

Maxwell & Putnam *vs.* So. Pac. R. Co., 48 La. Ann. Rep., 397.

Roberts *vs.* Riley, 15 La. Ann. Rep., 103.

Hunt *vs.* Morris, 6 Martin (La.), 680.

ARGUMENT.

The various assignments of error may all be discussed together, the first proposition being, that in order to support the exemption of the defendant company for any liability for the loss of cotton destroyed by fire, there must have been some consideration, other than the mere contractual relations of the parties, moving from the carrier to the shipper.

Wehmann *vs.* Minneapolis, etc., Co., 61 Am. & Eng. R. R. Cases, 273.

In order for such consideration to be valid, it must appear that both rates of transportation offered the shipper were reasonable, and that he had a genuine freedom of choice in making his selection.

Atchison, etc., Rwy. *vs.* Dill, 56 Am. & Eng. R. R. Cases, 376.

Duvenick *vs.* Mo. Pac. R. R. Co., 57 Mo. App., 550.

In Gulf, etc., R. R. Co. *vs.* McCarty, 82 Tex., 608, it was held, that even where the special contract limiting the carrier's liability recited that it was "in consideration of reduced rates" the shipper consented to a limitation of the carrier's liability, and it was further shown that *no reduced rates* were allowed the shipper, the limitation was held to be invalid as being without consideration.

And in order to uphold said contract it was decided in L. & N. R. R. Co. *vs.* Sowell, 49 Am. & Eng. R. R. Cases, 166,

that where there was controversy as to whether the carrier offered or was ready to ship under any other than a special contract limiting its liability, evidence tending to show that the shippers were allowed a choice of contract under which to ship, and, also, their instructions to their agents, was admissible in behalf of the carrier.

Where the carrier relied on the provisions in a contract exempting it from liability for delay, this provision was held invalid, where the only consideration therefor was the reduced rate granted, and it further appeared that this rate was allowed only in consideration that the goods be shipped at the owner's risk.

San Antonio, etc., R. R. Co. *vs.* Barnett, 34 S. W. Rep., 139.

Where it was stipulated that the liability of a carrier for an animal should not exceed a certain amount, but the charge for transportation was to be determined according to schedule rates, it has been held that such a contract was not one which fixed a correct valuation on which to base a rate of carriage, and the extent of the carrier's liability for the loss, but left the value to be ascertained from other evidence; in this case it was held that there was no consideration for the attempted exemption, and it was no defense to the carrier.

Kellerman *vs.* K. C., etc., R. R., 34 S. W. Rep., 41.

It is also settled that where no form of choice is shown to have been offered the shipper, and he, in reality, was allowed no option or selection as to the kind of contract under which he could ship his goods, nor was offered any difference in

rates, the contract limiting the carrier's obligation was a mere form, was without consideration, and could not be relied on.

Duvenick *vs.* Mo. Pac. R. R., 57 Mo. App., 550.

In Little Rock, etc., R. R. Co. *vs.* Cravens, 55 Am. & Eng. R. R. Cases, 650, it was distinctly held that a carrier could not limit its liability at all, unless the shipper was given an actual freedom of choice between the different kinds of contracts under which the company would carry the goods, and this even where shipper does not demand different terms.

In this case it appeared that the shipper had actual knowledge of the clause in the contract limiting the carrier's liability, and it further appeared that the latter had fixed a rate of transportation between the two points in question, and that no different rate or terms were obtainable, and the finding of the court was that there had been no freedom of choice, under these conditions, afforded the shipper, and hence the special modification restricting the carrier's liability was without consideration to support it.

It appears here, from the evidence of Pons, and also especially by the circular or tariff sheet issued by defendant or for its benefit, that the only rate of freight obtainable at all from it from Texarkana to New Orleans was sixty cents per hundred weight, the actual freight charged, and had plaintiff endeavored to obtain any other rate he would have been unsuccessful, because the agent at Texarkana had no authority to give it to him.

It is obvious that if the defendant charged the same rate for carrying plaintiff's cotton under its common-law liability, under which it would be responsible for loss by fire,

as it did actually charge for the contract, under which it would not be liable for loss by fire, there is here no valid consideration, because the charge for carrying under an unlimited liability is the same as that made for the same service restricted.

Michigan Central, etc., Co. *vs.* Hale, 6 Mich., 257, 258.

It is shown by the evidence of Pons that the agent of the company, who was not examined as witness, had no authority to offer transportation between Texarkana and New Orleans except at the fixed rate of sixty cents per hundred, which had already been fixed by his superiors. From this it would appear that there was no real option as to a choice of rates or different kind of contract really offered to the shipper by the company, and therefore none could be set up as a consideration passing to the shipper in support of the special limitation of liability.

L. & N. R. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. R. Cases, 372.

It is abundantly shown by the testimony, a part of bill of exception No. 1, that the contract was not reasonable, and hence it was void. Even where the limitations of liability are agreed to by the shipper in consideration of a reduced rate, if the carrier's rules would not have permitted the freight to be shipped unless the shipper accepted a bill of lading with the limitations as to this latter, it is void and of no effect.

St. Louis, etc., Co. *vs.* Spann, 57 Ark., 127.

It is clear here that plaintiff under no circumstances could have obtained from the defendant at Texarkana any kind of a bill of lading besides that under which he actually shipped, and hence defendant had placed itself in a position where it was unable or had deliberately refused in advance, even before it was asked, to allow the shipper any liberty at all in selecting the kind of contract under which he should ship, or by any rate other than that which he actually secured, which was absolutely and unalterably fixed in advance.

Contracts limiting the common-law liability of carriers are not specially favored in the law, and in order for any such contract to be binding on the shipper it must be fairly made and freely entered into by him.

Adams Express Co. *vs.* Nock, 2 Duval (Ky.), 562.

Hance, etc., *vs.* Wabash Western R. R. Co., 56 Mo. App., 476.

The carrier would be obliged to receive plaintiff's cotton and transport it under its common-law liability if the shipper had insisted upon it.

Wallace *vs.* Matthews, 99 Am. Dec., 473.

And here the plaintiff's agent was not allowed any opportunity to elect whether or not he would ship under the defendant's liability at common law or under its restricted liability as established by its attempted limitations, the contract limiting the carrier's liability is void.

It is not denied that the carrier may by special contract stipulate against any liability for the loss by fire of certain goods, but such liability must represent the consent of and choice of the shipper and not of the carrier; such contract

must be reasonable, must be based upon a sufficient consideration, and must be fairly and freely made by the shipper, otherwise it is not binding upon him.

A fair reading of the testimony of Pons would show that he was not allowed to choose whether he would ship under defendant's common-law liability or to make a contract for such service under restrictions. It may have been that he preferred a cheaper service with limited liability to a more expensive service with an unlimited liability, but it does not appear that he made any choice as to either one of these or was permitted any opportunity to do so.

The burden of proving not only the reasonableness and fairness of the stipulation limiting the company's liability was upon the carrier itself, and it was unreasonable, save when a fair and genuine option has been given the shipper, to choose the kind of contract or the rates of freight under which he should ship.

Lewis *vs.* Great Western R. R. Co., 3 Q. B. Div., 195. 47 L. J., Q. B. Div., 131.

Atchison, etc., Rwy. Co. *vs.* Dill, 56 Am. & Eng. R. R. Cases, 376.

A carrier cannot force upon the consignor a contract limiting the carrier's liability; the consignor may refuse to accept such a contract and insist upon the company taking his goods, subject to the general liability of common carriers, and this implies that he must have an option or chance of making his selection before or at the time of their refusal or allowance.

Carr *vs.* Lancashire, etc., Co., 21 L. J. Exch., 261; 7 Exch., 707.

The defendant offering its service to the public as a common carrier, and enjoying advantages and franchises as such, must be ready to do the business of a common carrier with the measure of responsibility imposed by the common law; but it may, at the same time, offer to do the same business under a limited liability, the limitation being fair and reasonable and resting upon a full consideration. An offer or readiness to transport the goods of its customer with one or the other degree of responsibility, it has been held, is as little as can be required of any common carrier; less than this does not present a *bona fide* reasonable alternative.

L. & N. R. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. R. Cases, 372, 375.

It is not shown here, nor was it attempted to be shown, that the plaintiff was offered any opportunity to choose between the two kinds of contracts—whether he would have shipped his cotton at his own risk, at a lower rate, or at the company's risk at a higher rate. He was told that the company had but one rate and but one kind of contract, which, of course, deprived the shipper of any option or choice of his own at all and left him the alternative of either shipping his cotton under such conditions as the company choose to make or not shipping it at all.

From a careful consideration of all the cases the following propositions appear to be axiomatic:

Originally there was no limit to the liability of a common carrier save by fortuitous event.

That in modern times a carrier may by special, express agreement limit his common-law liability.

That there must be a substantial consideration for such limitation.

That such exemption must be reasonable.

That he cannot stipulate for exemption for the negligence of his employee.

Complete reliance is placed by defendant and by the judge of the circuit court and the judges of the court of appeals upon what is known as the York case, reported in 3 Wallace, p. 107.

We believe that confidence is based upon an entire misapprehension of the principle laid down there as applied to the facts here.

Says Mr. Justice Field:

"Nor do we perceive any good reason, on principle, why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only; it involves simply rights of property; and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire.

"The law prescribes the duties and responsibilities of the common carrier. He exercises in one sense a public employment, and has duties to the public to perform."

* * * * * * *

"He is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although without any fault or neglect on his part, and he cannot, by mere act of his own, avoid the responsibility which the law thus imposes. He cannot screen himself from liability by any general or special notice, nor can he

coerce the owner to yield assent to a limitation of responsibility by making exorbitant charges when such assent is refused.

"The owner of the goods may rely upon this responsibility imposed by the common law, which can only be restricted and qualified when he *expressly stipulates* for the restriction and qualification. But, when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement.

"The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded."

In the case at bar there was no agreement at all.

There was simply a notice in the bill of lading.

There was no consideration *even* for such a notice.

There was but the one rate of freight. The shipper was compelled to ship in that way or not at all.

There was no scale of prices "proportioned to the risks assumed."

The carrier is bound to assume responsibility for the negligence or carelessness of his employee.

The law never requires the impossible.

And he who can best prove a fact, even though it involves a negative, must do so.

Even, *arguendo*, had there been a special agreement between the shipper and the carrier, for a consideration, exempting the carrier from responsibility for loss by fire, the

carrier would be compelled to show that such loss occurred through no fault or negligence of its employee.

It is utterly impossible for the shipper ever to show that a fire or loss occurs through the fault or negligence of the carrier's employee; for, when the goods are once delivered, they pass completely from the power, supervision, and control of the owner into that of the carrier.

The owner's dominion ceases, and should he attempt in any way to direct their care or shipment the effort would be resented as an interference totally unauthorized.

"*The owner of the goods may rely upon this responsibility imposed by the common law, which can only be restricted and qualified when he expressly stipulates for the restriction or qualification.*"

Where in this case is there any stipulation by which the shipper agreed to restrict the common-law liability of the carrier?

"*He cannot screen himself from liability by any general or special notice.*"

Is there anything in this case that can be dignified by the term "agreement"? Is the statement in the bill of lading anything more than a notice?

Who in the press of business can be expected to read such documents as the bill of lading in this case, and what layman can understand them?

"There is no doubt of the general proposition that restrictions upon the liability of a common carrier, inserted by him

in the bill of lading for his own benefit, and, in language chosen by himself, must be narrowly construed."

"Queen of the Pacific," 180 U. S., 52.

T. & P. Ry. Co. *vs.* Reiss, 183 U. S., 626.

"An exception in its bill of lading 'that the express company is not to be liable in any manner or to any extent for any loss or damage or detention of such package, or its contents, or of any portion thereof, occasioned by fire,' does not excuse the company from liability for the loss of such package by fire, if caused by the negligence of a railroad company to which the former have confided a part of the duty it had assumed."

"Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any reservation in his receipt, or by any arrangement between him and the performing company."

Bank of Kentucky *vs.* Express Co., 93 U. S., 174.

It has been repeatedly held in the Louisiana courts that the clause, "nor for any damage or injury thereto by water, moisture, etc.," is unreasonable, and that the shipper having shown that the cotton when delivered was so damaged, the burden is on the carrier to show that it did not occur through its fault or negligence.

Phelps & Co. *vs.* T. & P. Co., 1017 C. of A.

Phelps & Co. *vs.* T. & P. Co., 1190 C. of A.

Phelps & Co. *vs.* T. & P. Co., 1205 C. of A.

Kressner *vs.* T. & P. Co., 1189 C. of A.

Eitzen *vs.* T. & P. Co., 2263 C. of A.

"All the bills of lading are dated in October, 1883. The defense is that the bills contained the stipulation 'that the

carrier shall not be liable for loss or damage of any kind occasioned by delays from any cause and that if liable the defendant has not been put *in mora*, and these were pleaded by way of exception.'

"The first point seems not to be relied on as it need not be, since a clause stipulating non-liability for loss from delays from any cause has uniformly been held unreasonable, and the insertion of it in a bill of lading will not relieve the carrier from liability for losses occasioned by negligence (Addison's Contracts, 780; Myers' Fed. Dec., 611, 626)."

Berge *vs.* T. & P. Co., 37 La. A., 470.

"The force and effect of the law, as modified by the contract, is fully alleged on the one hand and admitted on the other. The loss and resulting damage being admitted, the defendant carries the burden of proving that the loss was 'not due to the company's negligence,' nor to any 'omission of duty,' in 'any manner causing or contributing thereto.'"

Maxwell & Putnam *vs.* R. R., 48 A. (La.), 385.

"In those cases which are not readily supposed to happen, without negligence, such as a loss by robbery, fire, &c., the carrier is bound to show that they happened without any fault or negligence on his part." * * *

"This rule gives to the plaintiff the advantage of implied or presumptive evidence of negligence, on the part of the masters or owners, which they are bound to disprove by showing due diligence."

Hunt *vs.* Morris, 6 Martin (La.), 676.

To the same effect appears to be the tendency of this court.

"To secure care, diligence and fidelity in the discharge of his important public functions, the common law charged the common carrier as an insurer; but the rigor of the rule has

been relaxed so as to allow reasonable limitations upon responsibility at all events, to be imposed by contract. We have, however, uniformly held, that this concession to changed conditions of business cannot be extended so far as to permit the carrier to exempt himself, by a contract with the owner of the goods, from liability for his own negligence. And as in case of loss the presumption is against the carrier, and no attempt was made here to rebut that presumption, the defendant's liability because in fault must be assumed upon the evidence before us."

Inman *vs.* Ry. Co., 129 U. S., 172–139.

T. & P. Ry. Co. *vs.* Clayton, 173 U. S., 348.

The rule of reasonableness has also been laid down by the court:

1st. "That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and therefore not binding."

2d. "That every attempt of carriers by general notice or special contract to excuse themselves from responsibility for losses or damage resulting in any degree from their own want of care or faithfulness, is against that good faith which the law requires as the basis of all contracts of employment."

Railroad Co. *vs.* Lockwood, 17 Wallace, 383.

The shipper was notified that there was but *one rate* and *one form* of contract, and he was compelled to accept the terms and conditions if he desired to ship. There was no alternative, no choice for him.

The shipper was compelled to take a bill of lading declaring that the carrier will not be responsible for loss by fire; and in case of loss by fire that he will have to take upon

himself the impossible task of proving negligence of the servants of the defendant.

Immediately upon the issuance of the bill of lading the carrier took out a policy insuring it against loss by reason of the negligence of its employees.

Thus the carrier has placed itself in a position, if the defense here can prevail, where the shipper has to watch its employees from the receipt to the delivery of the cotton, and where it is a matter of indifference to it whether the employees handle the cotton carelessly or not.

It is paid for carrying the goods; but whether they are lost or not is a matter that does not concern it, for in no manner can it be held for their safe-keeping and delivery.

Let us suppose that this cotton was destroyed by fire five hundred miles from the point of shipment or delivery, at some interior point away from any station, in the open prairie or in the woods away from human habitations, where none but the crew of the train could have seen it. No matter how gross the carelessness of the employees, the brakeman might have smoked his pipe or thrown a lighted match upon it, it would be impossible, utterly impossible, for the shipper to know or to show this fact.

Another instance: Suppose the cotton lost by fire in the warehouse or cars of the company at the point of shipment or delivery, should not the carrier be compelled to prove that he had provided every precaution to safeguard the property against such a casualty, or should he be permitted to say, "The property was lost by fire, whether through the carelessness of my employees or not, I do not know, and do not care. If you wish to hold me responsible,

you must prove that I could have prevented the loss and did not do so?"

How can the plaintiff prove any such fact? The possession of the property; the control of the premises; the supervision of its employees—all are in the exclusive dominion of the carrier.

The shipper cannot touch the property; he cannot direct the employees.

Yet, under the doctrine contended for by defendant, the plaintiff would have to prove facts which it is impossible for him to get, and which are peculiarly within the knowledge of defendant, before he could recover.

It is confidently submitted, then, that the defendant took the goods in this case under the common law, that its liability was to safeguard and deliver it, and that in order to relieve itself from responsibility for the destruction or non-delivery it must show conclusively that it exercised every care, and that its failure to perform the contract of carriage was due to no fault of its own.

The judgment brought here by writ of error should be reversed.

Respectfully submitted.

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